Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections	)	
3(n) and 332 of the	)	PR Docket No. 94-106
Communications Act	)	PR Docket No. 94-108
	)	
Regulatory Treatment of	)	
Mobile Services	)	

CONSOLIDATED REPLY OF GTE SERVICE CORPORATION TO CERTAIN COMMENTS ON THE PETITIONS OF THE STATES OF CONNECTICUT AND NEW YORK TO EXTEND RATE REGULATION OF COMMERCIAL MOBILE RADIO SERVICES

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ON BEHALF OF ITS AFFILIATES
GTE MOBILNET INCORPORATED
AND CONTEL CELLULAR INC.

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GTE Service Corporation ("GTE"), on behalf of its affiliates, GTE Mobilnet Incorporated and Contel Cellular Inc., hereby submits its Consolidated Reply to Certain Comments on the Petitions of the States of Connecticut and New York To Extend Rate Regulation of Commercial Mobile Radio Services filed in the above-referenced Dockets.[1] This Reply is filed on a consolidated basis because the substance of the Comments of each of the Commenters was substantially similar.

[1] The Comments addressed in this Consolidated Reply were filed by American Mobile Telecommunications Association, Inc. ("AMTA"); Attorney General of the State of Connecticut ("Connecticut Attorney General"); Connecticut Telephone and Communication Systems, Inc. and Connecticut Mobilecom, Inc. ("Connecticut Telephone"); E.F. Johnson Company ("Johnson"); Mobile Telecommunications Technologies Corp. ("Mtel"); National Cellular Resellers Association ("NCRA"); Nextel Communications, Inc. ("Nextel"); Paging Network, Inc. ("Paging Network"); and Personal Communications Industry Association ("PCIA") (collectively, the "Commenters").

Introduction and Summary

In its implementing Orders,[2] the Federal Communications Commission ("Commission" or "FCC") has established a sound regulatory foundation for the continued growth and development of Commercial Mobile Radio Services ("CMRS"). By doing so, it is faithfully implementing the intent of Congress to create regulatory symmetry governing the provision of CMRS.[3]

Most of the Comments addressed in this Consolidated Reply correctly oppose state rate and entry regulation of CMRS. Consistent with the Comments of GTE, they note that Connecticut and New York have failed to satisfy either criteria of Section 332(c) of the Communications Act of 1934, as amended (the "Act"), needed to justify continued authority.[4]

Some of the Commenters go one step further, however, by urging the Commission to deny the Connecticut Department of Public Utility Control ("DPUC") and New York Public Service Commission's ("NYPSC") petitions to extend rate regulation of non-cellular services while simultaneously urging it to continue rate regulation of cellular services. In any event, most of the Commenters propose special regulatory treatment

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[2] See In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 72 RR 2d 147 (1993); Second Report and Order, 9 FCC Rcd. 1411 (1994) ("Second Report and Order"); Third Report and Order, FCC 94-212 (released September 23, 1994) ("Third Report and Order").

[3] See The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993) ("OBR").

[4] See 47 U.S.C. § 332(c)(3)(A)(i), (ii).

for non-cellular services. GTE opposes this anomaly. The Commenters' proposal of disparate regulatory treatment for different mobile services with a high degree of substitutability contravenes the very reason Congress amended Section 332 of the Act--namely, to promote competition by regulatory parity.

In addition, the NCRA argues, in broad and unsupported terms, that the cellular market is uncompetitive and therefore deserves continued regulation by the DPUC and NYPSC. However, the solid body of evidence submitted by GTE and other opponents of the States' petitions conclusively demonstrates that the provision of CMRS is competitive.[5] Moreover, the Connecticut Attorney General and Connecticut Telephone, both of which support DPUC's petition, add nothing to the merits of Connecticut's petition because they provide no independent proof of anti-competitive conditions within that State.

Ultimately, since the cellular markets within Connecticut and New York are competitive, and because Congress clearly did not intend to punish cellular services by establishing a disparate regulatory regime over cellular CMRS, the Commission should reject the Commenters' arguments that support special regulatory treatment. Instead, the Commission should adopt the Commenters' arguments that support federal preemption of state rate regulation of all CMRS providers.

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[5] See, e.g., GTE Service Corporation Comments (filed in all petitioning states); Bell Atlantic Metro Mobile Companies Comments (Connecticut); NYNEX Mobile Communications Company Comments (New York); and McCaw Cellular Communications, Inc. Comments (all states).

I. CONGRESS AND THE FCC INTEND TO CREATE A UNIFORM, NATIONWIDE, SEAMLESS REGULATORY FRAMEWORK GOVERNING FUNCTIONALLY EQUIVALENT MOBILE SERVICES

A. Congress Revised Section 332 to Promote Development of Mobile Radio Services by Establishing Regulatory Parity of CMRS Providers

In the OBR, Congress revised Sections 3(n) and 332 of the Act. Under the prior version of Section 332, land mobile services were classified into two categories: private land mobile services and public mobile services. Although "private" radio services effectively escaped regulation, public, or common carrier, mobile services eventually faced direct competition from these unregulated mobile services.[6] As a result, competing common carriers such as cellular operated at a regulatory disadvantage vis-a-vis the new mobile services such as traditional and Enhanced Specialized Mobile Radio ("SMR" and "ESMR") and Private Carrier Paging ("Paging").

In order to level the playing field between cellular and other functionally equivalent or substitute mobile services, Congress replaced the anachronistic categories with two newly defined categories of mobile services: commercial mobile radio service and private mobile radio service ("PMRS"). The Act, as amended, defined CMRS as "any mobile service . . . that is provided for profit and makes interconnected service available

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[6] In 1991, for example, the Commission authorized Nextel (then called Fleet Call, Inc.) to develop a wide-area, digital voice and data service that Nextel claimed was comparable or superior to cellular in quality. See Fleet Call, Inc., Memorandum Opinion and Order, 6 FCC Rcd 1533, recon. dismissed, 6 FCC Rcd 6989 (1991).

(A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."[7] PMRS means "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service."[8] Therefore, by definition, CMRS is a broad category for regulatory purposes.

Congress revised Section 332 because it found that the existing regulatory framework could "impede the continued growth and development of commercial mobile services and deny consumers the protections they need."[9] Congress recognized that an even-handed approach to regulation was required to promote investment in mobile services.[10] The intent was to

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[7] Communications Act, § 332(d)(1), 47 U.S.C. § 332(d)(1).

[8] Id., § 332(d)(2), 47 U.S.C. § 332(d)(2).

[9] H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993) ("House Report").

[10] In an implementing Order, the Commission stated:

> The continued success of the mobile telecommunications industry is significantly linked to the ongoing flow of investment capital into the industry. It thus is essential that our policies promote robust investment in mobile services. In this Order, we try to promote this goal by ensuring that regulation is perceived by the investment community as a positive factor that creates incentives for investment in the development of valuable communications services--rather than as a burden standing in the way of entrepreneurial opportunities--and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.

create a symmetrical national regulatory framework for mobile services, which, "by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[11]

In order to create this uniform regulatory framework, Congress re-classified mobile services and preempted state rate and entry regulation of CMRS.[12] The aim, it stated, was to "establish a Federal regulatory framework to govern the offering of all commercial mobile services."[13] To guide the Commission's implementation of revised Section 332, the legislative history instructs the Commission to "ensure that . . . similar services are accorded similar regulatory treatment."[14] The principle of regulatory parity, therefore, directs the Commission's treatment of competing mobile radio services.

B. The FCC recognizes That Its Mandate is to Implement Regulatory Parity Governing Similar Mobile Radio Services

The Commission has acknowledged its mandate to bring about regulatory parity: "Our preemption rules will help promote investment in the wireless infrastructure by

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Second Report and Order at para. 20.

[11] House Report at 260.

[12] See Communications Act, § 332(c).

[13] House Report at 260 (emphases added).

[14] H.R. Rep. No. 213, 103d Cong., 1st Sess. 494 (1993) (Conference Report).

preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity."[15] In interpreting this mandate, the Second Report and Order adopted "as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers by this Order."[16] The Commission further stated that its interpretation of the CMRS definition[17]

> ensures that competitors providing identical or similar services will participate in the marketplace under similar rules and regulations. Success in the marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs--and not by strategies in the regulatory arena. This even-handed regulation, in promoting competition, should help lower prices, generate jobs, and produce economic growth.[18]

As part of its implementation of revised Section 332, the Commission reviewed the level of competition in the CMRS marketplace. The purpose of this review was to determine whether the Commission should exercise its forbearance authority as established by Congress in the OBR. Although the Commission reluctantly declined to treat CMRS as a single

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[15] Second Report and Order at para. 23.

[16] Id. at para. 15 (emphasis added).

[17] The Commission elsewhere concluded that CMRS providers include all cellular licensees, common carrier paging licensees, all wide-area SMR providers, and most SMR providers. Id. at para. 139.

[18] Id. at para. 19.

market for purposes of the forbearance analysis, it found that forbearance from certain Title II provisions was warranted in the case of all CMRS providers.[19]

Echoing its mandate, therefore, the Commission found that above a baseline level of actual competition--i.e., an area where industry growth is promoted and customers are protected--similar mobile radio services will be accorded similar regulatory treatment.[20] Each of the classes of CMRS, the Commission concluded, including cellular services, operates in this competitive area.[21] Accordingly, with respect to the removal of federal regulatory restraints, cellular providers will be treated in a manner similar to all other CMRS providers.[22]

In its forbearance analysis, the Commission focused on the level of actual competition within the individual categories of CMRS. "[O]ur doing so," it stated, "is not intended to prejudge the issue of whether, and to what extent, there is competition among various classes of CMRS services."[23] That judgment took place in the Commission's Third Report and Order, where, for purposes of determining the technical and operational rules governing CMRS, it adopted a

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[19] Id. at para. 137.

[20] Id. at paras. 137-39.

[21] Id.

[22] Id.

[23] Id. at para. 125 (emphasis added).

"broad approach" for determining whether and to what extent the various classes compete with one another.[24] If the reclassified "classes" compete with one another, the Commission explained, then CMRS should be treated as a single marketplace of "substantially similar" services.[25]

In its Third Report and Order, the Commission explained that in fashioning its technical and operational rules, it will be guided by the level of actual and potential competition among the "classes" of CMRS. It then concluded that "all commercial mobile radio services compete with one another, to meet the needs of consumers to communicate while on the move".[26] Thus, although it will regard the "classes" of CMRS separately for purposes of assessing the states' petitions, the Commission overwhelmingly favors viewing the provision of CMRS as a single marketplace. Absent such an approach, the Commission could not fulfill its mandate to create a symmetrical regulatory regime over CMRS.[27]

II. THE COMMENTERS SHOULD NOT BE ACCORDED SPECIAL REGULATORY TREATMENT IN THE PETITIONING STATES

Most of the Commenters ask for special treatment in the petitioning States. Although none of the Commenters support continued state rate regulation of non-cellular services,

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[24] Third Report and Order at para. 37.

[25] Id.

[26] Id. at paras. 37, 43.

[27] Id. at para. 42.

their arguments go too far by urging the Commission to carve out of Section 332 a regulatory exception for non-cellular services. Stated differently, whereas the Commission has expressed its fidelity to Congress' overall scheme of state and federal regulatory parity, the Commenters argue in favor of disparity and unequal regulatory advantage. In short, they propose exactly the sort of regulation which Congress sought to reverse, and which the Commission sought to avoid in fashioning its preemption rules and making its forbearance determination.

For example, PCIA states that "[t]o the extent states have even attempted to justify any extension of CMRS regulation ..., they have done so only with reference to cellular services."[28] Similarly, Johnson maintains that "different regulatory treatment is appropriate for different categories of CMRS licensees," and so it "continues to urge the Commission to exempt 'local' [SMR] systems from CMRS obligations."[29] "[U]ntil such time that effective competition arrives, perhaps in the form of [PCS] and [ESMR], continued rate regulation is necessary to restrain the dominating market power of cellular duopolists."[30] "The states have failed to demonstrate that rate regulation of emerging non-dominant CMRS [such as ESMR] providers is

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[28] PCIA Comments at i.

[29] Johnson Comments at 3-4.

[30] NCRA Comments at 2-3.

necessary to protect the public from anti-competitive practices and other abusive behavior."[31]

In general, the Commenters' arguments in favor of special treatment run along two lines: (1) the States' petitions fail to either mention or prove the existence of market failure in the States' non-cellular markets;[32] or (2) eliminating state rate regulation of "incumbent cellular operators" would permit predatory practices that could inhibit the competitiveness of non-cellular providers.[33]

A. GTE Supports the Commenters' Opposition to Continued State Rate and Entry Regulation but Opposes Their Proposals for Disparate Regulation of Similar "Classes" of CMRS

In its Comments filed September 19, 1994, GTE opposed the Connecticut and New York petitions. Since the level of competition within those States adequately protects CMRS subscribers and CMRS is currently not a replacement for a substantial portion of the landline telephone exchange service, the States should be preempted from any rate and entry regulation. Underlying GTE's position is its view that the CMRS marketplace must necessarily be regarded uniformly, as a single market of competing technologies.

While cellular service is competitive in its own right,

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[31] Nextel Comments at 10.

[32] See Johnson Comments; AMTA Comments; Mtel Comments; Paging Network Comments; PCIA Comments.

[33] See Nextel Comments; NCRA Comments.

cellular, ESMR, SMR and paging providers also compete with one another, or have the potential to compete with one another, to serve mobile radio services customers. As noted above, the Commission has concluded that "all commercial mobile radio services compete with one another, or have the potential to compete with one another."[34] In particular, "[t]oday, there is general agreement that wide-area SMR service is developing as a competitor to the cellular industry."[35] Further, "SMR operators also are positioning themselves to compete against cellular carriers."[36] With respect to paging, the Commission expects that CMRS services such as cellular and SMR will provide competition to paging.[37] The emergence of PCS will merely add one more log to this fire.

As one expert explained:

> Under reasonable conditions, all firms licensed to provide wireless telecommunications service-including companies supplying cellular services, PCS, and ESMR services-should be considered to be competitors in the same antitrust market. The key to this conclusion is that providers of mobile telecommunications services are legally able to provide a range of services and will be able to move from one to another rapidly and at modest cost. If firms can easily offer any of a wide range of

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[34] Third Report and Order at para. 43.

[35] Id. at para. 72.

[36] Id. at para. 73.

[37] Id. para. 35.

services, they are in the same market.[38]

GTE supports the Commenters' opposition to state rate and entry regulation, but only if the CMRS marketplace is viewed in its proper light--namely, as a single market for purposes of regulation. Regulatory parity--not regulatory preference--guides the Commission's implementation of revised Section 332.

B. The Commenters' Proposals Would Create a Non-Symmetrical Regulatory Structure that is Anti-Competitive

By proposing that "classes" of CMRS be singled out for federal preemption to the exclusion of similar competing CMRS, the Commenters are proposing to construct non-symmetrical, checkerboard regulatory structures. Such a proposal, however, can only lead to diminished competition in the CMRS marketplace. The Commenters offer several arguments in support of this retrograde structure.

A common theme taken up by the Commenters is that the duopoly system of facilities licensing is anti-competitive. For example, the NCRA claims that "continued rate regulation is necessary to restrain the dominating market power of cellular duopolists."[39] Similarly, Nextel maintains that "[c]ontinued regulation of cellular providers may be necessary to prevent anti-competitive practices that will stifle the

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[38] Dr. Stanley M. Besen, "Competitive Issues in the Mobile Telecommunications Market," prepared for the FCC's Panel Discussion on PCS Issues, April 7, 1994, at 4.

[39] NCRA Comments at 3.

development of the wireless marketplace."[40] Such statements smack of "regulatory strategies" intended to disadvantage cellular providers.

The basis of the Commenters' claim that restraint may be required is the States' tired argument that until "full" competition--whatever that is--is achieved in the cellular services marketplace, state rate regulation is warranted.[41] Conveniently, however, the States further claim that "full" competition can never be effectively achieved under the existing duopoly system of facilities licensing.[42] Doubtless, the ultimate impact of the Commenters' proposals would be dual regimes of perpetual state regulation of cellular services and no state regulation of non-cellular services.

Regulation of cellular services is not only bad public policy; it also cannot be justified under the prevailing market conditions within Connecticut and New York. In their Comments in opposition to the States' petitions, GTE and others provided studies by independent economists who described the existence of actual and incipient competition within the States' CMRS markets.[43] By contrast, neither NCRA

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[40] Nextel Comment at 10.

[41] See DPUC petition at 18; NYPSC petition at 4.

[42] Id.

[43] See, e.g., GTE Service Corporation Comments (all states [Stanley M. Besen, Charles River Associates, "Concentration, Competition and Performance in the Mobile Telecommunications

nor the other non-cellular Commenters supplied any factual basis to support their contention that the cellular market is non-competitive. The Connecticut Attorney General and Connecticut Telephone, moreover, merely endorsed the docket findings of the DPUC but otherwise provided no additional evidence to support their claims of anti-competitive and discriminatory practices in that State's "wholesale" cellular market. Thus, just as the States failed to clear the substantial hurdles of Section 20.13 of the Commission's Rules, so too have the non-cellular Commenters, who have added nothing to the merits of the States' petitions.

As current or future competitors of cellular services, the Commenters would enhance their own market prospects by handicapping providers of cellular services. For example, if disparate regulations are applied in the petitioning States, then the pricing strategies of cellular providers will be known well in advance of their implementation and thereby afford non-cellular competitors the opportunity to respond by adjusting their prices favorably. The result will be dampened competition and fewer consumer benefits. However, non-cellular providers should not be permitted to so brazenly undermine the benefits to be derived from Congress' revision of Section 332. Competition, not regulatory advantage, should determine success in the CMRS marketplace.

Services Market" (1994)]); Cellular Telecommunications Industry Association Comments (all states); and Bell Atlantic Metro Mobile Companies Comments (Connecticut).

Conclusion

The keystones of Congress' revision of Section 332 were regulatory parity of all commercial mobile services and federal preemption of state rate and entry regulation. The Commenters' proposals for special regulatory treatment would undermine these twin objectives.

By arguing that non-cellular services should be viewed apart from cellular services, the Commenters are asking the Commission to grant them a competitive advantage. Because the provision of cellular service within Connecticut and New York is competitive, there is no valid reason to treat any "class" of CMRS differently. Since there is actual and potential competition among the "classes" of CMRS, it follows that the CMRS industry must be regarded as a single marketplace, and thus deserving of uniform rules. Any other approach would be anti-competitive and contrary to Congress' intent to create a symmetrical regulatory structure governing CMRS.

WHEREFORE GTE Service Corporation respectfully requests that the Commission reject the Commenters' proposals for special regulatory treatment as well as reject continued state rate and entry regulation of all CMRS providers, including cellular carriers.

Respectfully submitted,

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ON BEHALF OF ITS AFFILIATES
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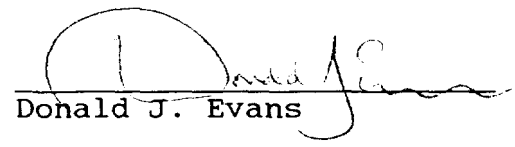
By: 
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CERTIFICATE OF SERVICE

I, Donald J. Evans, do hereby certify that a copy of the foregoing "Consolidated Reply of GTE Service Corporation" was mailed by First Class U.S. Mail, postage prepaid, this 19th day of October, 1994 to the following:

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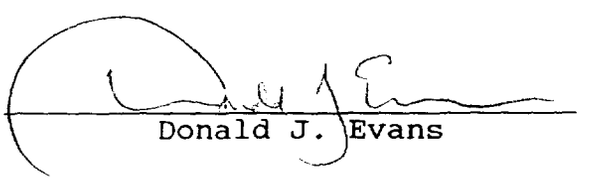

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